STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2003
v	No. 236851 Berrien Circuit Court
RAMIE LEWIS, Defendant-Appellant.	LC No. 00-406159-FC

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520(b)(1)(f), for forcing an act of sexual penetration on his live-in girlfriend. He appeals his conviction as of right. We affirm.

On December 7, 2001, defendant arrived home intoxicated and attempted to have sexual intercourse with the victim, his live-in girlfriend. Although the facts were in dispute as to the sequence of events that followed, it was undisputed that the victim telephoned 911 that evening. After placing the telephone call, the victim was unable to speak into the telephone because defendant was pulling her away from it. The 911 dispatcher heard the disturbance and crying through the telephone. She dispatched police to the victim's residence. While the police were en route, the dispatcher updated them that the disturbance may be a criminal sexual assault in progress.

When police arrived, they handcuffed defendant, who appeared intoxicated and appeared to have been physically exerting himself. The victim was very upset, was sweating and was crying. She had abrasions on her face. She told the interviewing officer that defendant struck her in the face, physically grabbed her, and eventually forced nonconsensual sexual intercourse on her after ripping off her underpants. The victim told the officer that she and defendant fell on the ground before the act of penetration. The victim was transported to the hospital and spoke to the emergency room nurse. The victim indicated that her boyfriend raped her and that he pulled her hair, bent her finger back, and punched her. The victim told the emergency room physician that her boyfriend forced vaginal intercourse against her will, that he hit her and that he bit her left shoulder. The victim had visible injuries, including abrasions on her left cheek and left upper lip, and a bite wound on her left shoulder.

At the time of trial, the victim was pregnant with defendant's child and admitted that she did not want to get defendant in trouble. She denied that the sexual penetration was forced. The victim admitted that she was angry with defendant on the night of December 7, 2000, because he was intoxicated. The victim also admitted that defendant demanded sexual intercourse and that a physical altercation subsequently took place during which defendant hit and bit her. He pulled her hair and her clothes. The victim testified that she fought defendant, but she never told him "no" to his demand for intercourse. Her underwear eventually ripped after being pulled in opposite directions by her and defendant. After that, the victim told defendant to go ahead and do whatever he wanted. She voluntarily removed her nightgown and allowed defendant to have sexual intercourse with her. She testified that she was tired of resisting defendant and knew that he would not give up no matter how much she resisted. The victim testified that after the sexual intercourse, defendant went to the kitchen. When he returned to the bedroom, she told him that she might leave him for another man. Another physical altercation took place. The victim testified that hitting and biting occurred during this second altercation. While the victim admitted that she was assaulted before the penetration, she claimed that all of her injuries occurred during the second incident, after the act of sexual penetration for which defendant was charged. The victim claimed that she telephoned 911 after falling to the floor during the second incident. She admitted, however, that she previously told the police and the emergency room physician that the penetration was not consensual.

I

Defendant first argues that the evidence was insufficient to sustain his conviction of first-degree criminal sexual conduct. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citation omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). We will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant argues that because the victim testified that the sexual intercourse was consensual and because her story changed on so many occasions, there was no credible evidence to support an act of forced sexual intercourse. We disagree. Defendant was convicted under MCL 750.520b(1)(f), which provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:
>
> (i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats. . . .

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have determined the essential elements of MCL 750.520b(1)(f) were proved beyond a reasonable doubt. First, it was undisputed that an act of sexual penetration occurred between the victim and defendant on December 7, 2000. Second, the evidence supported a finding that force was used to accomplish the penetration. The victim told the emergency room physician, the emergency room nurse, and the police officer who interviewed her within minutes of her 911 telephone call, that the sexual intercourse was nonconsensual and that she was assaulted before it occurred. The victim admitted at trial that defendant hit and bit her before the penetration. The evidence also showed that the victim's underwear was torn from her body before the sexual act and that she fought with defendant to prevent the sexual act. Finally, viewing the evidence in a light most favorable to the prosecution, there was also sufficient evidence to enable a rational trier of fact to determine that the element of personal injury was proved beyond a reasonable doubt.

The term "personal injury" is defined as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(j). Physical injuries need not be permanent or substantial to satisfy the personal injury element of MCL 750.520b(1)(f). *People v Mackle,* 241 Mich App 583, 596; 617 NW2d 339 (2000) (citation omitted). While the victim's testimony on this point was contradictory, she initially testified at trial that before defendant engaged in sexual penetration with her, he bit her on the face and hit her in the head. She also testified that before the sexual act, defendant bent one of her fingers back and pulled her hair. In addition, the victim told the police officer who first interviewed her that defendant punched her in the face and choked her before the sexual assault. The victim had visible injuries to her face when she was taken to the emergency room. We find this evidence sufficient to support the element of personal injury.

II

Defendant next argues that several of the prosecutor's actions constituted prosecutorial misconduct, which denied him a fair trial. While some of the instances of misconduct were met with objection by defense counsel, others were not. We review preserved issues of prosecutorial misconduct in context to determine if the defendant was denied a fair and impartial trial. *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001) (citation omitted). Unpreserved issues are reviewed for plain error. *Id.*, citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

Defendant first argues that the prosecutor's introduction of the 911 tape as evidence was improper because the evidence was irrelevant. In arguing that the 911 tape was irrelevant, defendant views the evidence solely in his own favor and in light of his own theory that the 911 telephone call occurred only after the consensual sexual penetration ended and a separate, physical altercation began. He characterizes the second altercation as a completely separate incident and asserts that evidence of the 911 telephone call related only to that incident. Therefore, he concludes that the tape was irrelevant to the criminal sexual conduct charge. At trial, defendant objected to the admission of the 911 tape on the same grounds. The trial court

overruled defendant's objection. On appeal, defendant does not challenge the trial court's ruling. Rather, he only challenges the prosecutor's decision to introduce the evidence. This argument has no merit.

"[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor is entitled to attempt to introduce all evidence that he legitimately believes will be accepted by the court as long as that attempt does not prejudice the defendant. *Id.* at 660-661. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In this case, the victim's testimony as to when the penetration occurred was not consistent, and she eventually denied that the act of intercourse was forced. The prosecutor's theory was that an act of forcible sexual penetration occurred during a physical altercation between defendant and the victim. The 911 telephone call made it more probable than not that the act of penetration was forced by physical violence. The 911 operator testified that when she received the telephone call, she heard a disturbance and crying. After listening to the open line, the dispatcher then alerted officers that a possible criminal sexual assault may be occurring. An officer, who reviewed the tape, heard defendant saying, "Suck it. Suck it." We find that the prosecutor's introduction of the tape into evidence did not constitute prosecutorial misconduct. The evidence was relevant and did not deprive defendant of a fair trial.

Similarly, we find no misconduct in the prosecutor's attempt to elicit testimony that defendant gave false information to the police. The evidence was admitted by the prosecutor in an attempt to prove the elements of the charge of resisting and obstructing a police officer, which charge was submitted to, but rejected by, the jury.[1] The evidence was not met with objection. It is not improper for a prosecutor to offer testimony to support a charged crime. *Noble, supra.*

Defendant additionally argues that the prosecutor committed misconduct by eliciting certain irrelevant testimony. Specifically, defendant challenges testimony that he exercised his right to remain silent after being given *Miranda*[2] warnings; that he was on parole at the time of the incident; and that the police obtained his social security number from an outstanding warrant for his arrest. In extremely cursory arguments, defendant concludes that the testimony was irrelevant to his case. He fails to explain or rationalize his conclusions, and he fails to cite any authority to support that the particular testimony warrants reversal. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting

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[1] We do not believe that the charge of resisting and obstructing an officer, MCL 750.479, was brought in bad faith or presented to the jury in bad faith. At the time of trial, *People v Vasquez*, 240 Mich App 239; 612 NW2d 162 (2000), was published and not yet reversed by the Michigan Supreme Court. See *People v Vasquez*, 465 Mich 83; 631 NW2d 711 (2001). This Court's decision supported that the verbal conduct of lying to a police officer about personal information, such as giving a false name and age, could constitute a violation of MCL 750.479. *Vasquez, supra*, 240 Mich App at 243-246. The evidence in this case supported that defendant lied to the police about his name, birth date, and social security number.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Under the circumstances, we find all of these issues abandoned. Nevertheless, we note that the challenged testimony was not solicited by the prosecutor but was articulated in nonresponsive answers to the prosecutor's questions. None of these nonresponsive answers were met with objection. Upon review, we find that any prejudice resulting from the unsolicited testimony could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Thus, there is no error requiring reversal. *Id.* Moreover, we note that two of the comments (i.e., that defendant was on parole and had an outstanding warrant) were not prejudicial such that they affected the outcome of trial. Before the comments were made, the victim testified, while being examined by defense counsel, that defendant had been in prison and was always in trouble. Defendant has not demonstrated prejudice, and we find no plain error requiring reversal. *Aldrich, supra.*

Defendant further argues that the prosecutor impermissibly admitted other bad-acts evidence. He argues that the evidence was not only irrelevant but was also inadmissible under MRE 404(b). Specifically, defendant challenges the 911 tape; testimony that the 911 tape captured him saying "Suck it"; and information that he slapped a child. Defendant fails to explain how the challenged evidence falls within the purview of MRE 404(b). He simply concludes, without discussion, that the evidence violated the rules of *People v Vandervliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). This issue is abandoned by the manner in which it is briefed. *Kelly, supra*. Further, we note that none of the evidence violated MRE 404(b). "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *VanderVliet, supra* at 65. The evidence of the 911 tape and the officer's review of that tape was not offered solely as propensity evidence. Rather, the evidence of the 911 tape was part of the res gestae of the crime. The prosecutor's theory of the case was that the sexual assault occurred in the middle of a domestic violence incident during which the 911 telephone call was made. This theory was supported by the evidence and reasonable inferences drawn from it. The 911 dispatcher determined, while listening to the "open line" telephone call, that there may be a criminal sexual assault in progress. She alerted the police, who had already been dispatched. The victim told the interviewing police officer that the nonconsensual penetration occurred on the floor. The victim testified at trial that she made the 911 telephone call after falling onto the floor. We find that the 911 telephone call, and testimony about the language contained in it, was not evidence of another crime or bad act but was arguably evidence of the crime for which defendant was charged. Thus, the prosecutor did not commit misconduct by admitting evidence in violation of MRE 404(b).

In addition, the fact that defendant slapped a child was never admitted into evidence. The prosecutor anticipated that the victim would testify, consistent with her preliminary examination testimony, that defendant struck her seven-year-old niece at the beginning of the altercation. While the prosecutor mentioned this anticipated testimony in her opening statement, the victim testified in a manner inconsistent with her preliminary examination testimony. The victim testified that her niece was in bed in another room at the relevant time. Thus, there was no evidence that defendant slapped the victim's niece. Defendant's argument that the evidence was admitted in violation of MRE 404(b) is frivolous. In addition, we disagree that the prosecutor's mention of the anticipated evidence during opening statement constituted misconduct. "The purpose of opening statement is to tell the jury what the advocate proposes to show." *People v*

Moss, 70 Mich App 18, 32; 245 NW2d 389 (1976). While the prosecutor never obtained the anticipated testimony, her mention of it did not prejudice defendant. The jury was instructed that it had to decide the case based on properly admitted evidence. It was also instructed that the lawyers' statements and arguments were not evidence.

III

Finally, defendant argues that the charge of resisting and obstructing a police officer, MCL 750.479, should not have been submitted to the jury. This issue is not preserved because defendant never challenged the submission of the charge to the jury. We review unpreserved allegations of error, constitutional and nonconstitutional, for plain error. *Carines, supra.*

"[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Any error in the submission of an unwarranted charge is cured when the defendant is acquitted of that charge. *Id.*[3] The only exception is where there is persuasive indicia of jury compromise. *Id.* at 487-488. In this case, there is no indication of jury compromise. We find that it is immaterial whether the submission of the charge was actually improper because any error was cured by defendant's acquittal on that charge. Thus, defendant cannot demonstrate the prejudice necessary to show plain error requiring reversal. *Carines, supra.*

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

[3] *Graves, supra* at 481-484, overruled *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), for the proposition that a defendant is always prejudiced when a jury is permitted to consider a charge that is unwarranted by the proofs.